

**OPEN RECORDS AND MEETINGS OPINION
2004-O-10**

DATE ISSUED: May 3, 2004

ISSUED TO: Stutsman County Correctional Center

CITIZEN'S REQUEST FOR OPINION

This office received a timely request for an opinion under N.D.C.C. § 44-04-21.1 from Mr. Michael Geiermann asking whether the governing authority of the Stutsman County Correctional Center 1) violated N.D.C.C. § 44-04-20 by failing to provide public notice of a meeting held on January 30, 2004; 2) violated N.D.C.C. § 44-04-19.2(2)(d) by failing to announce during an open meeting the topics to be discussed or considered at an executive session of the governing authority and failing to state the governing authority's legal authority for holding an executive session in violation of N.D.C.C. § 44-04-19.1; and 3) violated N.D.C.C. § 40-04-18 by failing to furnish a copy of a tape recording of the governing authority's executive session held on January 30, 2004.

FACTS PRESENTED

Ms. Carla Edinger is an employee of the Stutsman County Correctional Center (hereinafter, "County Correctional Center"). When certain state inmates were transferred to other facilities, Ms. Edinger's job and pay were changed. After her compensation decreased, Ms. Edinger contacted Mr. Michael Geiermann, an attorney who represents members of the Fraternal Order of Police. On January 20, 2004, Mr. Geiermann wrote to Ms. Jeanne Weber, County Correctional Center administrator, asking for clarification regarding Ms. Edinger's appeal rights. Letter from Michael Geiermann to Jeanne Weber (January 20, 2004). The letter also stated: "There is no doubt that Ms. Edinger will be appealing the decision to demote her. . . . I will be filing the appeal on her behalf [This issue] is also important to other employees of Stutsman County who have expressed some disgust and concern regarding recent employment actions which you have taken. I am sure that once we have resolved the issue of the correct procedure, there will be other grievances and appeals filed in regards to actions you have taken in regards to other employees." Id.

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After receiving Mr. Geiermann's letter, the Stutsman County state's attorney informed Ms. Weber that he would like to discuss this matter with the County Correctional Center's governing authority¹ in executive session at its next regularly scheduled meeting. Ms. Weber drafted an agenda for the meeting, and, prior to the meeting, mailed the agenda to the Jamestown Sun, two local radio stations, and the local cable TV station. In addition to notifying the media, the agenda was filed with the Stutsman County auditor and posted on an easel outside the room in the county courthouse where the governing authority met. The easel is in the building that constitutes the principal office of the County.

On January 30, 2004, the governing authority of the County Correctional Center and the Law Enforcement Center met in the Stutsman County courthouse. The meeting minutes reflect some discussion of the topics to be covered in the executive session. After the discussion, a motion was made and passed to go into executive session for attorney consultation as authorized by N.D.C.C. § 44-04-19.1(2) to discuss employee classification issues. Subsequent to the meeting, Mr. Geiermann requested a copy of the tape of the executive session, which was denied.

ISSUES

1. Whether the County Correctional Center's governing authority violated N.D.C.C. § 44-04-20 by failing to provide sufficient public notice of its January 30, 2004, regular meeting.
2. Whether the County Correctional Center's governing authority violated N.D.C.C. § 44-04-19.2(2)(b) by failing to announce during the open portion of the meeting the topics to be discussed at the executive session and stating the Center's legal authority for holding an executive session on these topics.
3. Whether the County Correctional Center's governing authority violated N.D.C.C. § 44-04-18 by failing to furnish a copy of a tape recording of the governing authority's executive session.

¹ The Stutsman County Correctional Center and the Law Enforcement Center are jointly owned and operated under a joint powers agreement by Stutsman County and the City of Jamestown.

ANALYSES

Issue One

Generally, all meetings of a public entity must be open to the public. N.D.C.C. § 44-04-19. A public entity includes public or governmental boards or agencies of any political subdivision. N.D.C.C. § 44-04-17.1(12)(b). A joint enterprise created by a joint powers agreement of several political subdivisions whereby the subdivisions delegate their performance of a governmental function to the joint enterprise is an "agency" of those subdivisions and, therefore, is a "public entity" subject to the open records and meetings laws. N.D.A.G. 2002-O-02; N.D.A.G. 98-O-04. The governing authority of the Stutsman County Correctional Center and Law Enforcement Center was established under a joint powers agreement between Stutsman County and the City of Jamestown pursuant to N.D.C.C. ch. 54-40.3. The governing authority is responsible for "the administration of expenditures, operations, and management of the [County Correctional Center and Law Enforcement Center] facilities," Joint Powers Agreement, ¶ II, E(2). The governing authority is a public entity subject to the open meetings and records laws.

Because the governing authority is a "public entity," public notice must be given in advance of its meetings, including executive sessions. N.D.C.C. § 44-04-20(1). The notice must be posted at the public entity's principal office, filed with the county auditor, and posted at the location of the meeting on the day of the meeting. N.D.C.C. § 44-04-20(4). The notice must contain the date, time, and location of the meeting, and must also contain the general subject matter of any executive session expected to be held during the meeting. N.D.C.C. § 44-04-20(2).

In this case, the agenda for the governing authority's January 30, 2004, meeting contained specific notice of an "[e]xecutive session for attorney consultation for discussing pending or threatened litigation regarding employee classification issues", LEC Governing Authority Agenda, Jan. 30, 2004, and cited N.D.C.C. § 44-04-19.1(2) as the statutory basis for the executive session. This is sufficient description of the general subject matter of the executive session. See N.D.A.G. 2002-O-10.

A copy of the agenda was provided to the local newspaper, to local radio stations and the local cable TV station. The agenda was also filed with the county auditor and posted on an easel outside the governing authority's meeting room in the county courthouse. The agenda contained the time and date of the meeting and the general subject matter of the executive session but failed to contain its location.

The notice requirements are violated when a notice is not provided in substantial compliance with N.D.C.C. § 44-04-20. N.D.C.C. § 44-04-20(9); N.D.A.G. 99-O-06. As

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noted, the notice must contain the date, time and location of the meeting as well as the general subject matter of any executive session expected to be held. N.D.C.C. § 44-04-20(1). In previous opinions, this office determined that the failure to include one of these items results in insufficient notice and violates N.D.C.C. § 44-04-20. See N.D.A.G. 2001-O-15 (failure to include a description of the subject matter of the executive session was insufficient notice.) It is my opinion that the meeting notice failed to contain a material item required by law and was therefore not provided in substantial compliance with N.D.C.C. § 44-04-20.

Issue Two

A governing body may close a portion of an open meeting, under certain circumstances, including attorney consultation. N.D.C.C. § 44-04-19.1(2). An executive session authorized by law may be held if, among other things:

- a. The governing body first convenes in an open session and, unless a confidential meeting is required, passes a motion to hold an executive session;
- b. The governing body announces during the open portion of the meeting the topics to be discussed or considered during the executive session and the body's legal authority for holding an executive session on those topics;
...
- d. The topics discussed or considered during the executive session are limited to those for which an executive session is authorized by law and that have been previously announced . . .

N.D.C.C. § 44-04-19.2(2).

The purpose of the announcement required in N.D.C.C. § 44-04-19.2(2)(b) is to provide the public with a legally sufficient reason for holding the executive session. N.D.A.G. 2000-O-10. In response to the opinion request, the County Correctional Center indicated it was relying on the attorney consultation provision in N.D.C.C. § 44-04-19.1(2) as the legal authority for its executive session.

When an executive session is held for "attorney consultation" under N.D.C.C. § 44-04-19.1, an announcement is sufficient if it indicates that the reason for the executive session is 1) attorney consultation 2) regarding reasonably predictable or pending litigation or adversarial administrative proceedings

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and 3) further indicates the topic of the executive session by announcing the names of the other parties to the litigation or proceeding, the purpose of the executive session, or other information about the topic of the executive session that does not reveal closed or confidential information.

N.D.A.G. 2001-O-15, citing N.D.A.G. 2000-O-10.

In this instance, the governing authority discussed for almost 30 minutes, in an open session, the employee classification issues that were to be discussed further in the executive session before the authority passed a motion to go into executive session. In addition, using a "Sample Form for Closing Executive Sessions," which is provided on the web site of this office, the governing authority explained that the legal basis for the executive session was attorney consultation to discuss threatened litigation regarding employee classification, as authorized under N.D.C.C. § 44-04-19.1(2). This announcement sufficiently indicates the topic to be discussed at the executive session, and the legal authority for holding the executive session. See N.D.A.G. 2000-O-10. Therefore, it is my opinion that the announcement of the executive session complied with N.D.C.C. § 44-04-19.2(2)(b).

Issue Three

As noted above, a governing body may close a portion of an open meeting for attorney consultation. N.D.C.C. § 44-04-19.1. The mere presence of the public entity's attorney at the meeting is not enough. N.D.C.C. § 44-04-19.1(4). N.D.A.G. 2001-O-15. The meeting must be held to receive and discuss the attorney's advice regarding pending or reasonably predictable civil or criminal litigation or adversarial administrative proceedings. N.D.C.C. § 44-04-19.1(4); N.D.A.G. 2002-O-10. The phrase "reasonably predictable" requires a realistic and tangible threat of litigation or adversarial administrative proceedings, and not a mere fear or potential of being a party to litigation or an adversarial administrative proceeding. N.D.A.G. 2001-O-15. Section 44-04-19.1, N.D.C.C., does not require a governing body to wait until the moment before a lawsuit or administrative appeal is filed before obtaining its attorney's advice in an executive session. Id.; N.D.A.G. 2003-O-14.

In this case, Mr. Geiermann stated "There is no doubt that Ms. Edinger will be appealing the decision to demote her. . . . I will be filing the appeal on her behalf." Letter from Michael Geiermann to Jeanne Weber (January 20, 2004). He also stated that he was sure there would be other grievances and appeals filed with regard to actions taken by the Center in regard to other employees. Id. Under the facts presented, it was reasonable for the County Correctional Center to conclude that there was a realistic and tangible threat of litigation or an adversarial administrative proceeding, or both.

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Having concluded that an executive session for "attorney consultation" was authorized in this situation, the remaining question is whether the discussion during the executive session was limited to receiving and discussing the attorney's advice regarding the reasonably predictable litigation or adversarial administrative proceedings. All meetings of a governing body that are closed must be recorded. N.D.C.C. § 44-04-19.2(5). The recording of a closed portion of a meeting is a closed record. Id. The executive session, which was recorded as required by N.D.C.C. § 44-04-19.1(2), was reviewed by this office. The discussion involved how to communicate with the affected employees and other matters relating to job classifications and pay levels that required legal review, in a way that would place the governing authority in a strong legal position should its actions be challenged in court or in an adversarial administrative proceeding. See N.D.A.G. 2001-O-15. The discussion was limited to the attorney's advice on these questions and the governing authority's discussion of that advice and thus was lawful.

It is my opinion that the governing authority's executive session was lawful and thus the County Correctional Center did not violate N.D.C.C. § 44-04-18 by refusing to disclose a recording of that session to Mr. Geiermann.

CONCLUSIONS

1. The public notice of the January 30, 2004, meeting of the governing authority of the County Correctional Center's, including notice of the executive session, was not issued in substantial compliance with N.D.C.C. § 44-04-20.
2. The governing authority's announcement of the topics to be discussed during an executive session and the legal basis for the session complied with the requirements of N.D.C.C. § 44-04-19.2(2)(b).
3. The governing authority had valid legal and factual reasons to hold an executive session for attorney consultation under N.D.C.C. § 44-04-19.1(2) because of a threat of legal action against the County Correctional Center by certain employees. The Center did not violate N.D.C.C. § 44-04-18 by refusing to disclose a copy of the tape recording of the executive session.

STEPS NEEDED TO REMEDY VIOLATION

A notice that the January 30, 2004, meeting occurred needs to be prepared and filed with the county auditor and posted at the public entity's principal office. N.D.C.C. § 44-04-20(4). The notice must contain the date, time, and location of the meeting and the

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topics that were considered at the meeting. N.D.C.C. §44-04-20(2). The notice must specify that the minutes of the meeting are available from the governing authority for any member of the public who requests a copy.

Failure to take the corrective measures described in this opinion within seven days of the date this opinion is issued will result in mandatory costs, disbursements, and reasonable attorney fees if the person requesting the opinion prevails in a civil action under N.D.C.C. § 44-04-21.2. N.D.C.C. §44-04-21.1(2). It may also result in personal liability for the person or persons responsible for the noncompliance. Id.

Wayne Stenehjem
Attorney General

Assisted by: Michael J. Mullen
Assistant Attorney General

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